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In the SUPREME COURT of the UNITED STATES

No. [redacted] 199

WILFRED R. WHEELER
v.
STATE OF VERMONT

Jurisdictional Statement

James C. Cleveland
New London, New Hampshire

Laurence F. Gardner
Lebanon, New Hampshire

In the SUPREME COURT of the UNITED STATES

No. _____

WILFRED R. WHEELER
v.
STATE OF VERMONT
Docket No. 1927 (Vermont)
On Appeal from the Supreme Court of Vermont

WILFRED R. WHEELER
v.
STATE OF VERMONT
Docket No. 42-69 (Vermont)
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October Term 1968, No. _____

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JURISDICTIONAL STATEMENT

Opinion

These cases involve identical issues and one jurisdictional statement is presented herein covering both cases as permitted by Rule 15 of the Supreme Court. The opinion in the first case, Docket No. 1927 of the Vermont Supreme Court entered on January 8, 1969, is reported in 127 Vermont _____ 249 A2d 887. A copy of the opinion is attached hereto as Appendix A.

The opinion in the second case, Docket No. 42-69 of the Vermont Supreme Court, entered on April 4, 1969, is reported in 127 Vermont _____ ___ A2d ____. A copy of that opinion is attached hereto as Appendix B.

Jurisdiction

Both cases involved an appeal from the decisions of the Vermont Commissioner of Taxes to the Washington County Court and then to the Supreme Court of Vermont.

In Docket No. 1927 Wilfred R. Wheeler appealed to the Commissioner of Taxes of the State of Vermont as to the assessment of his 1966 income tax which was computed pursuant to the 1966 revision of the Vermont income tax law, 1966 Public Act No. 61. His appeal was taken under the provisions of 32 Vermont Statutes Annotated, Section 5885. The adverse decision of the Commissioner of Taxes was appealed to the Washington County Court of Vermont. The decision of the Commissioner of Taxes was affirmed by the judgment of the County Court and the Appellant appealed that decision to the Vermont Supreme Court.

On January 8, 1969, the opinion of the Vermont Supreme Court was entered affirming the judgment in the County Court. No motion for reargument was filed. On April 1, 1969, the Appellant filed a Notice of Appeal to the United States Supreme Court with the Clerk of the Vermont Supreme Court.

In 1967 the Vermont legislature amended the laws as to the state income tax to require taxpayers to pay as Vermont income tax 25 per cent of their federal income tax. The method of measuring the tax on the Appellant's Vermont derived income remained the same. Docket No. 42-69 involves an identical appeal as to the Appellant's 1968 income tax, to the Vermont Commissioner of Taxes. The Wash-

ington County Court upheld the Commissioner's decision as did the Vermont Supreme Court by its decision entered on April 4, 1969, and a Notice of Appeal was filed with said Court on that same date. No motion for rehearing was filed.

The jurisdiction of the Supreme Court to review these decisions is conferred by 28 USC Sec. 1257(2) which provides that such decisions of the Vermont Supreme Court may be reviewed by appeal where the validity of a state statute is drawn in question as being repugnant to the Constitution of the United States and where the Vermont Supreme Court has ruled in favor of the validity of the statute.

In both cases the Appellant claimed that the computation of the Vermont income tax pursuant to Vermont law (in Case No. 1927 - 1966 Public Act No. 61; in Case No. 42-69 - 1967 Public Act No. 121) violated his rights under the United States Constitution and that such state law was repugnant to the United States Constitution. In both instances the Vermont Supreme Court upheld the validity of the statutes and the method contained therein for measuring the tax on Appellant's Vermont derived income.

These decisions constituted final judgments by the highest court in Vermont. The proceedings in the Vermont courts did draw into question the validity of portions of 1966 Public Act No. 61 and 1967 Public Act No. 121, and this question was decided in favor of the validity of the statutes. The requirements for jurisdiction of this court under 28 USC 1257(2) appear to have been satisfied thus sustaining the jurisdiction of the Supreme Court to review

the judgment of the Vermont Supreme Court. "Where it appears from the opinion of the state court of last resort that a state statute was drawn in question as repugnant to the Constitution and that the decision of the court was in favor of its validity, we have jurisdiction on appeal. For we need not inquire how and when the question of the validity of the statute was raised when such question appears to have been actually considered and decided by that court." Charlestown Assn. v. Alderson, 324 US 182, 185. The Court also stated in Wilson v. Cook, 327 US 474, 480, "This jurisdiction requirement is satisfied only if the record shows that the question of the validity under federal law of the state statute as construed and applied...has in fact been decided by it (the Court) and that its decision was necessary to the judgment." See also Poulous v. New Hampshire 345 US 395, 402; Saltonstall v. Saltonstall, 276 US 260, 267; Chicago R.I. & Pac. Ry. v. Perry, 259 US 548, 551; American Oil Co. v. Neill 380 US 451.

Statute in Question

The Appellant challenged those portions of the two statutes that provide for the computation of the Vermont income tax as to non-residents.

As to Docket No. 1927, these provisions include 1966 Public Act No. 61, Sections 5811(19), 5822 and 5823 and are set forth in Appendix C, attached hereto.

As to Docket No. 42-69 these provisions include 1967 Public Act No. 121, Section 5822 which is also set forth in Appendix C and attached hereto.

Questions Presented

The question is whether the Constitution of the United States bars the State of Vermont from imposing an income tax on the Appellant, a non-resident, which measures the tax rate to be applied by using the Appellant's total income including non-Vermont-derived income.

Appellant contends that the Vermont statutes which take into account his total income including non-Vermont-derived income to measure the rate of tax to be applied to his Vermont derived income is in fact taxation of non-Vermont-derived which is beyond the jurisdiction of Vermont and therefore a taking of property without Due Process of law contrary to the Fourteenth Amendment. Appellant also contends that the effect of 1966 Public Act No. 61 and 1967 Public Act No. 121, as applied to non-residents, results in a higher tax rate on the Appellant than as to a Vermont resident with the same Vermont derived income thus violating the Appellant's constitutional rights under the Privileges and Immunities provision of Article 4 of the United States Constitution. Further, the substantial difference in treatment between the Appellant and residents under 1966 Public Act No. 61 and 1967 Public Act No. 121 denies the Appellant Equal Protection of the laws of Vermont contrary to the Fourteenth Amendment.

Statement

These cases are test cases to determine the constitutionality of the radical innovation first

embodied in 1966 Public Act No. 61 and carried forward intact into 1967 Public Act No. 121 for the taxation of income of a non-resident.

The facts in Case No. 1927 were as follows: Appellant, a resident of the Town of Enfield, New Hampshire, was employed throughout 1966 as a commission salesman soliciting orders for his employer from retail food outlets both in New Hampshire and Vermont. He received as total compensation during the year 1966 for his services as commission salesman the sum of $7,714.47. Of this amount $1,928.82, or 25%, was derived from sales obtained in Vermont. In accordance with 1966 Public Act No. 61 Appellant's 1966 Vermont income tax was computed as follows:

Adjusted Gross Income	$7,714.47
Deductions (federal)	- 771.45
4 exemptions x $500	- 2,000.00
Vermont Taxable Income	$4,943.02
Application of tax rates:	
$1,000 @ 2%	$ 20.00
$2,000 @ 4%	80.00
$1,943 @ 6%	116.58
Tentative tax	$216.58
(reduced by percentage of Appellant's income derived outside of Vermont (75%)	
Tax liability	$54.15

The Appellant began his appeal and challenge of the Vermont taxing statute by taking an administrative appeal before the Commissioner of Taxes as of July 21, 1967, and pursuant to 32 VSA 5884. The appeal to the Commissioner was made on the basis of an agreed statement

of facts in which the Appellant contended, "That the present statutory method of computing the Vermont income tax as applied to non-residents is unconstitutional and contrary to the U.S. Constitution." The Commissioner after his review which included the "Agreed Statement of Facts" denied the petition for refund. The Appellant appealed to the Washington County Court of Vermont and the case was submitted again upon an agreed statement of facts which contained the Appellant's allegations that his Vermont income tax for the taxable year 1966 "was determined in contravention of the provisions of the Constitution of the United States." The judges of the Washington County Court on February 19, 1968, entered the following judgment order. "(1) The claim of the Appellant, that the computation of his Vermont income tax pursuant to No. 61 of the 1966 Public Acts of Vermont constitutes an infringement and denial of his rights under the United States Constitution is denied. (2) The determination of the Commissioner of Taxes of the State of Vermont dated October 25, 1967, denying the claim and petition of the Appellant for refund of income taxes in this action is sustained." On February 27, 1968, Appellant filed a notice of appeal to the Vermont Supreme Court and on January 8, 1969, the Supreme Court of Vermont affirmed the judgment of the Washington County Court. The Court considered and denied the Appellant's claims that 1966 Public Act No. 61 as it applied to the taxation of income of non-residents violated the Due Process clause of the Fourteenth Amendment, the Privileges and Immunities guaranteed

to him under Article 4, Section 2 and his right to Equal Protection of the laws under the Fourteenth Amendment.

On April 17, 1967, the Vermont legislature enacted Public Act No. 121 which locked the Vermont income tax to the federal income tax thus incorporating the same income, deductions and exemptions. The method of determining the Appellant's Vermont income tax was changed but only as to form.

For the tax year 1968 Appellant's Vermont income tax was computed as follows:

*Total Federal Tax on Income of $9,219.00	$1,409.00
Measure of Tax:	25%
Vermont Income Tax	352.00
Reduced by percentage of income which is not Vermont income (70%)	246.00
Appellant's Adjusted Vermont Tax	$106.00

*(Appellant filed "mock Federal Return" as individual filing separately because his wife had income in New Hampshire.)

His total 1968 income was $9,219.00 and of that amount $2,765.00 was Vermont income or 30%.

The appeal route in this second case was exactly the same as Case No. 1927 with no deviations.

The Vermont Supreme Court looked again at the Appellant's claim that the income tax statute as revised in 1967 violated his constitutional rights. The same issues were presented to the Court. The same constitutional arguments were made by counsel for the parties. Appellant's constitutional objections were rejected and the

statute as revised was upheld.

As indicated above, under the 1967 revision Appellant's total income continues to be used to measure the tax rate applied to Vermont income.

The federal tax rate is at the same time the Vermont tax rate. The Vermont income tax is 25 per cent of the applicable federal tax which increases as the taxpayer's income increases. The subsequent reduction to allegedly remove the non Vermont income comes at the same point as under previous law. Vermont still measures the rate of tax to be applied to Vermont income by the use of both Vermont income and non-Vermont income.

There has been no change whatsoever in the method of determining the tax rate applicable to a non resident's Vermont income. The opportunity for even greater disparities and inequities is present under the 1967 law because of the higher progressive federal tax rates incorporated into the Vermont income tax.

All of the Appellant's constitutional objections set forth with regard to the 1966 tax law apply with equal force to the 1967 revision.

The Question is Substantial

The method of taxing the income of a non-resident is of importance to every state in the United States. Until Vermont enacted Public Act No. 61 in 1966 all states imposing an income tax on non-residents excluded income not derived in the taxing state. The only reference to income not derived from the taxing state was

for the purpose of determining allowance of a pro-rata share of deductions and exemptions as permitted in some states. The thrust of the 1966 Vermont tax law if upheld would permit a taxing state to measure its rate of income tax on a non-resident by looking to the non-resident's total income.

There is little practical difference between use of non-Vermont-derived income to measure the rate of tax or to measure the tax itself, the result being the same -- a higher tax. The latter is unconstitutional. The former should be.

Vermont is limited to taxing income derived from sources within Vermont. Shaffer v. Carter, 252 US 37. Therefore if the method of taxing non-residents as set forth in 1966 Public Act No. 61 and 1967 Public Act No. 121 does in fact constitute a tax on a non-resident's non-Vermont-derived income, such a tax is beyond the jurisdiction of Vermont and constitutes a violation of the Due Process clause of the Fourteenth Amendment. Frick v. Penna., 268 US 473. Despite the fact that the Vermont tax statute appears to remove non-Vermont-derived income after the tentative tax is determined, (1966 Public Act No. 61, Sec. 5823; 1967 Public Act No. 121, Sec. 5822) the Appellant's tax is still higher than a resident with the same Vermont derived income. The Court in reviewing the Vermont taxing statute must look to "the practical operation and effect of the tax imposed", Shaffer v. Carter Ibid p. 55, not to form.

In the particular circumstances of New Hampshire and Vermont, sharing the Connecticut River as a common boundary for hundreds of miles, Vermont may be in the position of forcing an income tax on New Hampshire to counter the effect of the Vermont income tax on a New Hampshire resident's New Hampshire income. New Hampshire should be permitted to determine its own tax policy without being forced to offset an indirect Vermont income tax upon a New Hampshire resident's New Hampshire income. So long as the United States is a federal system there must be limits to the taxing jurisdiction of a state and the freedom of each state to develop and initiate its own taxing policy and goals.

There does not appear to be a decision of this Court specifically permitting taxation of non-residents in the manner enacted by Vermont. In Maxwell v. Bugbee, 250 US 525, and Great Atlantic & Pacific Tea Co. v. Grosjean, 301 US 412, this Court decided that inheritance tax rates and licensing tax rates applied to non-residents may be measured by factors outside the taxing state. Yet neither of these decisions involves an income tax on an individual non-resident and may be distinguished from the present case on grounds of economic policy or statutory conditions for inheritance. This Court's decision in Maxwell v. Bugbee, supra was 5-4. Despite the fact that Maxwell v. Bugbee, supra, has been on record for fifty years, no state other than Vermont has attempted to use the principle set forth therein as to a non-resident's income tax.

Clearly, then, the question in this case is substantial and of great importance to taxing jurisdictions throughout the United States as well as to the Appellant and to the states of Vermont and New Hampshire.

Conclusion: For the reasons stated it is respectfully submitted that probable jurisdiction should be noted.

James C. Cleveland
New London, New Hampshire

Laurence F. Gardner
Lebanon, New Hampshire

APPENDIX A

OPINION OF SUPREME COURT OF VERMONT

Docket No. 1927

WILFRED R. WHEELER
v.
STATE OF VERMONT
(Entered January 8, 1969)

The opinion for the Court was delivered by Justice Barney.

The plaintiff is a Vermont taxpayer and a New Hampshire resident. He is seeking reduction of tax levies against his Vermont-earned income on the grounds that they are so formulated as to be unconstitutionally discriminatory. The tax commissioner and then the lower court denied relief and he has appealed.

The facts are not in dispute. The plaintiff lives in Enfield, New Hampshire, and is employed as a salesman by Ward Foods, Inc., of White River Junction, Vermont. He solicits orders from retail food outlets in both Vermont and New Hampshire, and receives commissions based on his sales. These commissions were his only income during 1966, the year involved in this litigation, and totaled $7,714.47. This income was the "adjusted gross income" for the plaintiff for 1966, under the definition in 32 V.S.A. sec. 5811(1). Of this total income, $1,928.62 represented compensation earned in Vermont and is his "Vermont derived income" under 32 V.S.A. sec. 5811(7). It amounts to 25% of his total compensation of $7,714.47.

Under Vermont taxing procedure for the year 1966, all individual taxpayers commenced the computation of their income taxes in the same way. Starting with "adjusted gross income", which is defined in 32 V.S.A. sec. 5811(1) as the adjusted gross income determined under the laws of the United States, except for capital gain and losses and certain exempt income not applicable here the "Vermont taxable income" is arrived at. 32 V.S.A. sec. 5811(19). This is the taxable income of the taxpayer under the laws of United States, but again excluding any consideration of capital gains or losses or exempt income. In other words, it is the adjusted gross income less all deductions available to the taxpayer on his federal return, without distinguishing their Vermont, New Hampshire or other derivation. 32 V.S.A. sec. 5811(13). From this is also deducted the appropriate personal exemptions allowed by Vermont law. 32 V.S.A. sec. 5826. With Vermont taxable income arrived at, every individual taxpayer, resident or nonresident, in computing his 1966 tax, applied the following table in 32 V.S.A. sec. 5822:

If the amount of that Vermont taxable income is $1,000 or less the tax shall be an amount determined as follows: 2% of that Vermont taxable income;

$1,001 through $3,000 - $20 plus 4% of the excess over $1,000;

$3,001 through $5,000 - $100 plus 6% of the excess over $3,000;

$5,001 or over - $220 plus 7-1/2% of the excess over $5,000.

For the Vermont resident, this final figure is the tax he pays. For the nonresident, this tax figure is further reduced by the application of 32 V.S.A. sec. 5823, which provides: "The tax imposed upon the income of a nonresident under section 5822 of this title is reduced by a percentage equal to the percentage of his adjusted gross income for the taxable year which is not Vermont derived income.

For the further protection of the nonresident taxpayer, 32 V.S.A. sec. 5827 allows a credit to avoid double taxation of income by the income tax law of another state, provided that state accords a reciprocal credit. Since New Hampshire assesses no general income tax based on ordinary earned income, this credit is not involved in this case. This leaves as the plaintiff's tax, the amount arrived at by applying the percentage relationship between his Vermont income and his total income to the tax figure based on his full income.

The process may be more easily visualized set out in the following form:

Adjusted gross income from U.S. return less any capital gains or plus any capital losses, and less any exempt income	$7,714.47
Personal exemptions (4 x $500) plus deductions (10%)	2,771.45
Vermont taxable income	$4,943.02

Tax according to table in 32 V.S.A. sec. 5822	$216.58
Ratio of Vermont derived income to total adjusted gross income	25%[1]
Tax of plaintiff as nonresident . . .	$54.15

Analysis of this computation demonstrates several things. First, that the Vermont taxpayer in this situation pays a tax of $216.58. Second, a like New Hampshire taxpayer whose income was 100% earned in Vermont would also pay a tax of $216.58. Third, and perhaps most important, the New Hampshire taxpayer would never pay any greater tax than his Vermont counterpart. It emphasizes that the New Hampshire taxpayer pays a part of the usual Vermont tax proportioned directly by the extent of his Vermont income.

The plaintiff finds this discriminatory. He argues that a New Hampshire taxpayer with some New Hampshire income pays a higher tax on his Vermont-earned portion than a Vermont taxpayer whose total income is the same as the Vermont income of the New Hampshire taxpayer. Reference to two of his examples may make his argument clearer:

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1 The statutory formula calls for a percentage of 75 to be computed and then deducted from the total tax. The result is the same.

Taxpayer	Vt.	N.H.
Adjusted gross income	$4000	$6000 ($4000 Vt. earned)
Two exemptions	1000	1000
10% standard deduction	400	600
Vermont taxable income	2600	4400
Vermont tax	84	184
2/3 ration Vt./N.H. earnings		67%
Adjusted Vermont tax		122.28

It is his contention that the true comparison lies, not between taxpayers with the same adjusted gross income, but between taxpayers having identical Vermont income. He further complains that an increase in the New Hampshire taxpayer's income from New Hampshire sources will increase the amount of tax he pays on his Vermont earnings, if it moves him up another tax bracket.

This last is, of course, true. In fact an increase in adjusted gross income from any taxable source might do the same thing. It is conceivable that this New Hampshire resident with Vermont earnings could be in the same predicament if he had no New Hampshire income at all, but did have income from someplace outside of Vermont that put his adjusted gross income at the level in question, and was not of a sort to be eligible for any reciprocal income tax credit.

It is the argument of the plaintiff that, since the addition of New Hampshire income increases the tax, it must be New Hampshire income that is being taxed. However, in reality what is happening is that Vermont income is being taxed

at an increased rate, and nothing more.

If the contention of the plaintiff is sound, at some point as progressive tax rates advanced, the measure of the tax payable would begin to go beyond the total Vermont income earned and require resort to money earned in New Hampshire. This certainly would be true if progressive rates in Vermont began to reach the highest levels applicable in Federal income taxation.

This is made abundantly clear if, in any of these situations, we assume a totally confiscatory tax rate on Vermont income of 100%. As we have said, if New Hampshire income were in fact being taxed, the application of such a rate would necessarily, at some point, create a tax liability larger than the total Vermont income. But this cannot occur, because even with no deductions and that confiscatory rate, the provisions of 32 V.S.A. sec. 5823 will impose a limit measured by the Vermont derived income. This illustrates that the contention that the Vermont procedure taxes property beyond its jurisdiction cannot be supported. With it falls the argument that the Due Process Clause has been violated. McCutchan v. Oklahoma Tax Commission, 191 Okla. 578, 579, 132 P2d 337.

It is also arithmetically obvious that the plaintiff would have no cause to complain if the Vermont income tax was a flat rate rather than progressive, since the variations in the size of his adjusted gross income would not affect the tax on his Vermont earnings. An evaluation of all of his contentions makes it clear that it is the

progressive nature of the tax rate which is truly under attack.

Progressive tax rates on income, widespread among the United States and firmly imbedded in the federal tax structure, are intended to make more equitable the tax burden as it falls upon citizens of various states of affluence. It is their purpose to take into account variations in ability to pay. As such they found early and complete constitutional acceptance in Brushaber v. Union Pacific, 240 U.S. 1, 25, dealing with the 1913 federal income tax, and the question has remained at rest in that area. Shaffer v. Carter, 252 U.S. 37, 51, in 1920 indicated that it is within the taxing power of state governments to levy income taxes with progressive rates. We view this aspect of the matter as constitutionally settled.

We must then determine whether the application of these tax rates, applied to the plaintiff as a nonresident, is a transgression of constitutional bounds. His arguments are framed in terms of discriminatory treatment which he claims violates his privileges and immunities under Article 4, Section 2 of the United States Constitution, and also his right to equal protection of the laws under the Fourteenth Amendment. He contends that since he, as a nonresident, is taxed at a higher rate on his Vermont derived income than a Vermont resident whose total income is of Vermont derivation, he has been treated with such unfair diversity as to violate these constitutional prohibitions. To show such

a violation, it is his burden to demonstrate discrimination to the extent that it is arbitrary and unreasonable. Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 121, 41 S Ct 45, ___, 65 L Ed 165, 169.

If the principle of ability to pay is accepted, his contention is misleading, for he limits his comparison to a taxpayer of lower income than his. Going back to the examples already set out, if, in any of them relating to a combination of Vermont and New Hampshire income, the taxpayer were a Vermont resident, he would pay the full assessed tax on his combined Vermont and New Hampshire incomes, with no percentage reduction. To show discrimination, the plaintiff must first demonstrate that he is disadvantaged compared to another in an equivalent position. He has made no such showing. There is no place where his burden is increased over that of a resident in an equivalent income position. Even if it were, the taxpayer would still be confronted with the burden of showing such discrimination, nonexistent here, to be such an invidious inequality as to be arbitrary, for it to be condemned as unconstitutional. Maxwell v. Bugbee, 250 U.S. 525, 543.

But, again, his real objection is the operation of the taxing progression. He objects to the importation of his total income for rate determination purposes. Yet this principle, too, has already been approved as constitutional. Maxwell v. Bugbee, supra, 250 U.S. 525, 539; Great Atlantic & Pacific Tea Co. v. Grosjean,

301 U. S. 412, 425. A similar principle was recognized and accepted in our own case of Gulf Oil Corp. v. Morrison, 120 Vt. 324, 330, which states the necessity of establishing by appropriate evidence any claim that extra-territorial values are being taxed.

It was for the plaintiff to show that the Vermont taxing system was arbitrary and unreasonable in its classification to sustain a violation of the Equal Protection Clause. Maxwell v. Bugbee, supra, 250 U.S. 525, 543. It was for the plaintiff to demonstrate diversity of treatment without reasonable basis to sustain an abridgment of his constitutional privileges and immunities. Travis v. Yale and Towne Mfg. Co., 252 U.S. 60, 79. He has not done so.

Judgment affirmed.

APPENDIX B

OPINION OF SUPREME COURT OF VERMONT

(Docket No. 42-69)

WILFRED R. WHEELER
v.
STATE OF VERMONT
(Entered April 4, 1969)

Per Curiam: An amendment to the Vermont income tax laws prompted a retesting of the issue settled in Wheeler v. State, 127 Vt. ____, 249 A2d 887. That case validated the application of progressive tax rates, based on the total taxable earnings, to income earned in Vermont by a non resident taxpayer. The present case, raising the identical question under the new law, has followed the prescribed route from the initial appeal to the tax commissioner through the county court to this tribunal.

By No. 121 of the Public Acts of 1967 the Vermont income tax law adopted the Federal progressive rates by providing for an income tax, in the usual case, computed as twenty-five per cent of the Federal income tax liability. This substitution of the Federal progressive for the former Vermont rate schedule was the substantive change in the law. Many details of the various statutory provisions required verbal adjustment, but the provisions applicable to the impact of progressive tax rates on non resident taxpayers remained the same.

The definition of "adjusted gross income", 32 V.S.A. Sec. 5811(1) in the 1966 law, retains that number and is altered only in that the former exclusions which differentiated it from the comparable Federal definition are now removed. These exclusions were not at issue in the first Wheeler case, and are not at issue here.

The definition of "Vermont derived income", 32 V.S.A Sec. 5811(17) under the 1966 law, has become 32 V.S.A. Sec. 5823(b) of the new law with slight alteration in language of no consequence to this case.

"Vermont taxable income" under 32 V.S.A. Sec. 5811(19) of the 1966 law is no longer separately defined, since the exclusions it contained are now eliminated or encompassed in the present 32 V.S.A. Sec. 5823(b). There are no changes affecting the issue here.

Since the new enactment bases the Vermont tax directly upon the "Federal income tax liability", 32 V.S.A. Sec. 5811(4), the separate definition of "taxable income under the laws of the United States" has no separate utility and the definition in 32 V.S.A. Sec. 5811(13) of the 1966 law required no counterpart in the new act. Again, this does not affect the issues here.

The provisions of the 1966 law, 32 V.S.A. Sec. 5826, as such, have been repealed, since Vermont has adopted the Federal exemptions by basing its tax on the Federal income tax liability under 32 V.S.A. Sec. 5811(4). The old section 5826 has been replaced by the provisions relative to reciprocity to avoid double

taxation formerly found in 32 V.S.A. Sec. 5825 of the 1966 law.

The computation of the 1966 tax was governed by 32 V.S.A. Sec. 5822 as it then stood, which contained the schedule for the progression of the then tax rates. This section was, at the time, supplemented by 32 V.S.A. Sec. 5823 relating to the reduction of taxes on non residents. The new taxing provision is in present 32 V.S.A. Sec. 5822, which reads as follows:

> A tax is imposed for each calendar year or fiscal year ending during that calendar year upon the Vermont income earned or received in that taxable year by every individual, estate and trust. The amount of this tax shall be measured by 25 per cent of the federal income tax liability of the taxpayer for the taxable year, reduced by a percentage equal to the percentage of the taxpayer's adjusted gross income for the taxable year which is not Vermont income.

As can be seen from its language, this section both determines the tax and provides for its application to non residents who have non-Vermont income. The plaintiff in this case had such income in the taxable year 1968, just as he did in the former case. According to the findings, 30% of this taxpayer's 1968 income was earned in Vermont, amounting to $2,765.59 out of his total earnings of $9,219.00. His liability to Vermont was computed first as 25% of his Federal tax, then reduced again by 70%, corresponding with the share of his income not earned in Vermont. His Vermont tax was $106.00

The issue is the identical one raised in Wheeler v. State, supra 127 Vt, _____, 294 A2d 887. It is stated by both parties as:

> Does the Constitution of the United States bar a State from imposing an effective graduated income tax on nonresidents which, for the purpose of applying the effective graduated rates to which residents are subject, takes into account the nonresident's total net income from all sources, and then reduces the tax by the ratio of in-state income to total income?

The plaintiff taxpayer again illustrates the nature of his complaint by a computation which he advances as the constitutionally proper procedure. He applies to his Vermont derived income a deduction figure amounting to 30% of his total deductions, arriving at a taxable Vermont income. He than computes the applicable Federal tax on that income and presents 25% of that as his proper Vermont tax. His computation is as follows:

Appellant's Vermont Derived Income:	$2,766.00
30% of deductions: ($921.00)	307.00
30% of exemptions ($1,200.00)	400.00
Taxable Vermont Income:	2,059.00
Applicable Federal Tax:	319.00
Vermont Measure of Tax:	x 25%
Adjusted Vermont Tax:	79.75

Thus, there is again before us, although in the context of a statute amended in particulars not varying the application of the doctrine,

the issue of measuring the level of progressive tax rates by total income, although imposing those rates only on Vermont earned income. The tax commissioner and the lower court found no justification for departing from the results in Wheeler v. State, supra 127 Vt. ___, 249 A2d 887.

We are in agreement that the same results follow in the present case as did in that. The constitutional arguments raised in the first Wheeler case are exactly applicable here and require the same result. No error appears.

Judgment affirmed.

APPENDIX C

Sections of Public Act No. 61 of the Laws of the State of Vermont 1966 Special Session applicable to the taxation of income of a nonresident in Vermont.

Sec. 5811. Definitions

The following definitions shall apply throughout this chapter unless the context requires otherwise:

(19) "Vermont taxable income" means, for any taxable year and for any taxpayer, the taxable income of the taxpayer for the taxable year under the laws of the United States, but excluding:

(A) Income which, under the laws of the United States, is exempted from taxation by the states;

(B) Any consideration of capital gains and capital losses;

(C) Income exempted from taxation by this state under the statutes of this state specifically referred to in section 5819 of this title;

provided, however, that the personal exemptions allowed as deductions in computing Vermont taxable income shall be determined under section 5826 of this title and not otherwise.

Sec. 5822. Tax on income of residents and taxable nonresidents.

A tax is imposed for each calendar year, or fiscal year ending during that calendar year, upon the income earned or received in that

taxable year by every resident of this state, and, subject to section 5823 of this title, by every taxable nonresident of this state. The amount of this tax shall be determined in accordance with the following table, and shall be measured by the Vermont taxable income of the resident or nonresident for the taxable year:

If the amount of that Vermont taxable income is $1,000 or less the tax shall be an amount determined as follows: 2% of that Vermont taxable income;

$1,001 through $3,000 - $20 plus 4% of the excess over $1,000;

$3,001 through $5,000 - $100 plus 6% of the excess over $3,000;

$5,001 or over - $220 plus 7-1/2% of the excess over $5,000.

Sec. 5823. Reduction of taxes on nonresidents.

The tax imposed upon the income of a nonresident under section 5822 of this title is reduced by a percentage equal to the percentage of his adjusted gross income for the taxable year which is not Vermont derived income.

Section of Public Act No. 121 of the Laws of the State of Vermont 1967 Session applicable to the taxation of income of a nonresident in Vermont.

Sec. 5822. Tax on income of individuals, estates and trusts

A tax is imposed for each calendar year or fiscal year ending during that calendar year upon the Vermont income earned or received in that taxable year by every individual, estate and trust. The amount of this tax shall be measured by 25 per cent of the federal income tax liability of the taxpayer for the taxable year, reduced by a percentage equal to the percentage of the taxpayer's adjusted gross income for the taxable year which is not Vermont income.

SUPREME COURT U. S.

JUN 9 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 199

Docket No. 1927 (Vermont)

WILFRED R. WHEELER,

Appellant,

—v.—

STATE OF VERMONT.

ON APPEAL FROM THE SUPREME COURT OF VERMONT

Docket No. 42-69 (Vermont)

WILFRED R. WHEELER,

Appellant,

—v.—

STATE OF VERMONT.

ON APPEAL FROM THE SUPREME COURT OF VERMONT

MOTION TO DISMISS OR AFFIRM

STATE OF VERMONT.

by MESSRS. PATERSON, GIBSON,
NOBLE AND BROWNELL

Jonathan N. Brownell, Esq.
Counsel for the Appellee

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IN THE

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ON APPEAL FROM THE SUPREME COURT OF VERMONT

Docket No. 42'69 (Vermont)

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—v.—

STATE OF VERMONT.

ON APPEAL FROM THE SUPREME COURT OF VERMONT

MOTION TO DISMISS OR AFFIRM

Appellee, in the above-entitled cases moves to dismiss the appeal, or to affirm the final judgments of the Supreme Court of the State of Vermont on the ground that the appeal does not present a substantial Federal question and that the questions are so insubstantial as not to warrant further argument.

Opinions Below

The opinions of the Supreme Court of Vermont reported at 127 Vt. ——, 249 A.2d 887 (1969) and 127 Vt. ——, 253 A.2d 136 (1969), are printed in Appendices A and B of the Jurisdictional Statement.

Question Presented

Whether the Constitution of the United States bars a State from imposing a graduated income tax on nonresidents which, for the purpose of applying the graduated rates to which residents are subject, takes into account the nonresident's total net income from all sources (after allowing for pro-rated personal type deductions and exemptions), and then reduces the tax by the ratio of in-state income to total income?

Statute in Question

The pertinent provisions of the Vermont Income Tax Law (Tit. 32, chs. 151-152), are set forth in Appendix C of the Jurisdictional Statement.

Statement

Under the Vermont income tax, residents are taxable on all income from whatever source derived, but nonresidents are taxed only on income derived from sources within the State. Prior to 1968, Vermont applied its graduated income tax rates directly to income from sources within the State. (32 V.S.A. Chapter 151). However, this

method necessarily placed nonresidents in lower brackets than residents with comparable incomes, the Legislature in 1965 and 1967 adopted the statutes now under attack, which are designed to apply the State's graduated rate schedule equally to residents and nonresidents.

The method employed by Vermont statute, under both the 1966 law and the 1967 law, to accomplish this result is as follows:

> (1) A tentative tax is computed on the nonresident's total income just as if he were a resident, giving him the same deductions and exemptions as a resident is allowed.
>
> (2) The tentative tax is then reduced to the ratio of the nonresident's Vermont adjusted gross income to his total adjusted gross income and this is the tax he pays.*

By this method only income derived from Vermont sources is taxed, and the taxpayer receives his pro rata portion of all deductions, business and non-business, and exemptions allowed residents.

Appellant, who resides in New Hampshire, is a salesman for Ward's Foods, Inc., and he solicits orders from retail stores in both New Hampshire and Vermont. Under the 1966 Vermont statute, Appellant's income tax liability for 1966, as shown in his return was as follows:

* Adjusted gross income is defined in substantially the same way as that term is used for purposes of the Federal income tax (Sec. 62, Int. Rev. Code). The term means gross income, less trade and business expenses and designated expenses of employees. No objection has been raised by the Appellant to the use of adjusted gross income for this purpose, his objection is the more basic one set out in the text.

Total adjusted gross income	$7,714.47
Less full deductions and exemptions	2,771.45
Net Income	$4,943.02
Tentative Tax (the amount which would be payable by a Vermont resident)	$ 216.88
Ratio of Vermont income to total adjusted gross income $1,928.62 / $7,714.47 = 25%	
Tax liability of Appellant, determined by applying the 25% ratio to the amount of tentative tax	$ 54.15

After filing his return under protest and paying the tax, Appellant filed a claim for refund, contending that Vermont exceeded its constitutional power in enforcing the tax. He contends that Vermont is required to determine his tax by taking into account only his Vermont income, allowing him pro-rata personal deductions and exemptions, as follows:

Vermont income	$1,928.62
Ratio of Vermont income to total adjusted gross income $1,928.62 / $7,714.47 = 25%	
Less pro-rated personal deductions and exemptions, or 25% of $2,771.45	692.86
Net Income	$1,235.76
Vermont Tax	$ 54.15

Under the method of determining his Vermont tax that Appellant contends is mandated by the Federal Constitution,

tion, he would pay approximately half the tax imposed by the statute, because, taking only his Vermont income into account in determining the tax rate, the Appellant would have been subject only to the State's first brackets—1% on the first $1,000 and 4% under the remaining $235.76, whereas under the statutory method, his rate of tax is determined by his total net income of some $3,000 and reaches higher brackets. The same effective result obtains under the 1967 Vermont statute, also under attack here, which adopted the Federal progressive rate in place of the 1966 rate table.

There can be no contention that Vermont is taxing Appellant on an out-of-state income, inasmuch as Vermont's income tax rate is applied exclusively to his Vermont derived income. Appellant does contend that Vermont is required by the Federal Constitution to take into account, in fixing its rates of tax on the income of a nonresident, only his income from sources within the State.

The Supreme Court of Vermont rejected the Appellant's contentions that the tax violates the Due Process of Law Clause, the Privileges and Immunities Clause of Article 4, Section 2, and the Equal Protection of the Laws Clause of the Federal Constitution.

This motion is made by the Appellee, State of Vermont, because the holding below by the Supreme Court of that State is grounded on well-established constitutional principles, which do not warrant review by this Court.

ARGUMENT

I.

The Due Process Clause is not violated by taking out-of-state income into account solely to determine tax rates.

Appellant complains that to take out of state income into account in order to measure the rate of tax to be applied from in-state sources violates the Due Process Clause of the Fourteenth Amendment, in that it constitutes extra-territorial taxation. Fifty years ago essentially the same contention was rejected by this Court in *Maxwell v. Bugbee* (250 U.S. 525 (1919)), where the same method was used to determine the rate of inheritance tax on the estate of a non-resident. In that case, the State of New Jersey, in order to apply its graduated inheritance rate tax structure to non-residents, determined the inheritance tax rates applicable to a non-resident estate by computing the tax on the entire estate, $1,000,000 of which was admittedly non-taxable by the State, and thereafter by reducing the tentative tax thus determined by the ratio of out-of-state to in-state assets. Mr. Justice Pitney stated the taxpayer's contention as follows:

> "It is next contended that the [tax] so calculated [by reference to property beyond the jurisdiction of the State] is unreasonable and arbitrary, and amounts to a deprivation of property without due process of law because it in effect taxes property beyond the jurisdiction of the State." (250 U.S. at p. 539; our emphasis)

The Court, four Justices dissenting, rejected the argument declaring:

> "In the present case the State imposes a privilege tax, clearly within its authority, and it has adopted as a measure of that tax the proportion which the specified local property bears to the entire estate of the decedent. That it may do so within limitations which do not really make the tax one upon property beyond its jurisdiction, the decisions to which we have referred clearly establish. The transfer of certain property within the State is taxed by a rule which considers the entire estate in arriving at the amount of the tax. It is in no just sense a tax upon the foreign property, real or personal. It is only in instances where the State exceeds its authority in imposing a tax upon a subject matter within its jurisdiction in such a way as to really amount to taxing that which is beyond its authority, that such exercise of power by the State is held void. In cases of that character the attempted taxation must fail. Looney v. Crane Co., 245 U. S. 178; International Paper Co. v. Massachusetts, 246 U. S. 135. To say that to apply a different rule regulating succession to resident and non-resident decedents is to levy a tax upon foreign estates, is to distort the statute from its purpose to tax the privilege, which the statute has created, into a property tax, and is unwarranted by any purpose or effect of the enactment, as we view it." (Pp. 539-540).

This method of taxing inheritances and decedent's estates has become a characteristic feature of death taxes in a number of States in the fifty years since *Magoun v. Illinois Trust* was decided.[7]

[7] Alabama: Ala. Code (Recomp. 1958) ; Arkansas: Ark. Stat. (1947) tit. 84 (1960 Supp.); Florida: Fla. Stat. (1959) c. 198 (1960 Supp.); Georgia: Ga. Stat. Ann. (1936) tit. 92 (1962 Supp.); Kentucky: Ky. Rev. Stat. (1962) c. 140; New Jersey: N.J. Rev. Stat. (1937) 54:33-1; New York: N.Y. Tax Law (1960); Pennsylvania: Pa. Stat. Ann. (1962 Supp.); South Carolina: S.C. Code (1962) tit. 65 (1962 Supp.); South Carolina: S.C. Code (1962) tit. 65 (1962 Supp.).

The principle that out-of-state property may be taken into account in fixing the rate of tax, so long as the tax measure is limited to property or activities within the State, has since been applied in sustaining state chain store taxes. In *Great Atlantic & Pacific Tea Co. v. Grosjean* (301 U.S. 412 [1937]), A&P attacked a Louisiana license tax under which the rate of tax per store varied with the number of stores in the chain, both within and without Louisiana. This Court, citing *Maxwell v. Bugbee*, *supra*, rejected the contention that the Due Process Clause was violated, because out-of-state factors were considered in fixing the rate of tax.

Consequently, for half a century, the principle has been established in this Court that so long as a State is taxing only property or other tax measures within its jurisdiction — as to which there is no controversy in this case — there is no constitutional prohibition against taking out-of-state factors into account in determining the effective rate of tax.

II.

Since the use of out-of-state income to fix tax rates is designed to apply the State's graduated income tax rates to residents and non-residents alike, there is no violation of the Privileges and Immunities Clause.

There is no substance to the Appellant's contention that the Privileges and Immunities Clause of Article 4, Section 2 is violated by the Vermont tax. Appellant's argument that he is discriminated against is based on the premise that Vermont must treat him, for rate purposes, as a taxpayer with an income of approximately $1,250, the amount of his Vermont net income (after pro rating all deductions and exemptions), because a Vermont resident with a $1,250

net income would pay only roughly $25, whereas his tax has been determined to be about $50. The asserted discrimination lies in the determination of the Vermont Legislature that the Appellant is to be treated solely for rate purpose, as earning net income not of $1,250, but his actual net income from all sources of $5,000.

The standard established by this Court for determining whether a non resident has been denied the Privileges and Immunities safeguarded by Article 4, Section 2 of the Constitution is whether a State has worked discrimination against the non resident with respect to which no "reasonable ground for diversity of treatment exists." *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 78 (1920); *Toomer v. Witsell*, 334 U.S. 385, 396 (1948). At first blush, *Maxwell v. Bugbee*, the inheritance tax case cited above, would appear to dispose summarily of Appellant's contention in this case, for the Court there held that the Privileges and Immunities Clause does not bar a State, in applying its inheritance tax, from taking his entire estate into account. What New Jersey did in inheritance taxation is essentially what Vermont has done in the case at bar in income taxation. However, we desire to call the Court's attention to the fact that the Privileges and Immunities Clause objection in *Maxwell v. Bugbee* appears to have been rejected in that case, in part at least, on a ground that the Court has since repudiated. The New Jersey inheritance tax statute was drawn in terms of taxation of estates of "non residents", not in terms of decedents who were not "citizens" of the State. In passing on this issue, the Court declared:

> "The alleged discrimination, here complained of, so far as privileges and immunities of citizenship are concerned, is not strictly applicable to this statute because the 'difference' in the method of taxation rests upon residence and not upon citizenship." (250 U.S. at pp. 538, 539.)

Later decisions of the Court dealing with state taxation have held that, although the Privileges and Immunities Clause speaks of "citizens" and not "residents", a general taxing scheme "if it discriminates against all non-residents, has the necessary effect of including in the discrimination those who are citizens of other States". *Travis* v. *Yale & Towne Manufacturing Co.*, 252 U.S. at p. 79; *accord*: *Toomer* v. *Witsell, supra.* Consequently, the authority of the *Maxwell* case is open to question in respect to the Privileges and Immunities Clause issue.

We accordingly turn to other tax cases arising under the Privileges and Immunities Clause that do not rely on the distinction between "non-residents" and "non-citizens". The Court has held that complete denial to non-residents of personal exemptions granted to residents violates the Privileges and Immunities Clause, (*Travis* v. *Yale & Towne Manufacturing Co.*, 252 U.S. 60 [1920]), but that under the clause non-residents may be limited in losses allowable as offsets against income tax to those incurred within the State. (*Shaffer* v. *Carter*, 252 U.S. 37 [1920]). Likewise, since the States tax non-residents only on income from sources within the state, the Court has held that there is a reasonable basis for denying non-residents personal type deductions, such as real estate taxes on a residence, and interest on personal obligations, although such deductions are allowed residents. (*Travis* v. *Yale & Towne Manufacturing Co., supra;* see also matter of *Goodwin* v. *State Tax Commission*, 286 App.Div. 694, 146 N.Y.S.2d 172 (3rd Dep't 1955) aff'd 1 N.Y.2d 680, 133 N.E.2d 711 (1956), appeal dismissed for want of a substantial federal question (352 U.S. 805 [1956]).

The Vermont tax readily satisfies the constitutional requirement that its method of taxing non-residents rest on

"reasonable grounds".* It rests on the Legislative objective to apply the principle of taxation according to ability to pay, embodied in its graduated rate schedule adopted in the income tax law, to residents and non-residents alike. This principle is the distinctive feature of income taxation in the United States, and in many foreign countries. There are now 42 States and local governments in this country that levy graduated personal income taxes.

What possible offense to the Privileges and Immunities Clause can be found in the extension of the ability to pay principle to non-residents? Certainly, not that non-residents are treated less advantageously than residents, for both are subjected to the progressive tax rates. Indeed, it was precisely to achieve equality between non-residents and residents that the 1965 amendment to the Vermont tax here in controversy was adopted, for prior thereto only residents were subjected to tax rates determined by their total incomes, but non-residents were taxed at rates measured only by their in-state incomes.

To illustrate from the facts in this case, if the Appellant were a resident of this State, he would pay a Vermont income tax of approximately $200, based on taxable income of roughly $5,000 from all sources, after allowance for his deductions and personal exemptions. This is an

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* That Vermont's levy is not hostile towards non-residents is also reflected in the operation of the statute, which grants non-residents personal type deductions that it could constitutionally deny them, i.e., a pro-rata portion of real estate taxes paid on the non-resident's home, interest on his home mortgage and the like. See *Travis* v. *Yale & Towne Manufacturing Co., supra; Matter of Goodwin* v. *State Tax Commission*, 286 App.Div. 694, 146 N.Y.S.2d 172 (3rd Dep't 1955), aff'd 1 N.Y.2d 680, 133 N.E. 711 (1956), appeal dismissed for want of a substantial Federal question, 352 U.S. 805 (1956).

effective rate of 4% applied to each dollar of his taxable income. As a non-resident who earned only 25% of his total taxable income for the year in Vermont, this same effective rate is applied to the one-fourth of his taxable income earned in this State, so that he is subject to a tax of approximately $50. In this way, the graduated rate feature is applied to both residents and non-residents, limited in the non-resident's case to his income from sources within the State, at the same 4% effective rate.

But if, as the Appellant claims, the Federal Constitution compels the State to consider only his Vermont income in determining not only his income subject to tax, but also his tax rate, he would pay only about $25 on his Vermont based income, or at an effective rate of approximately 2% on the one-fourth of his taxable income derived from services rendered in the State.

If the method used by the State of Vermont should be held to be proscribed to the States by constitutional restrictions, a taxpayer doing business in or deriving income from more than one State, would escape the impact of graduated income taxation at the rates imposed by such States. Accordingly, we submit that there is no merit to the Appellant's contention that the extension of the ability to pay principle to non-residents is not a "reasonable ground" for the tax at issue. The "reasonable ground" which eminently justifies the levy under this clause of the Constitution is nothing less than the principle of progressive income taxation.

III.

The application of Vermont's graduated income tax rates to non-residents is based on a reasonable policy and does not deny the non-resident the equal protection of the laws.

The Appellant's final attack on the constitutionality of the denial of his claim for refund of the State income tax is that the levy violates the Equal Protection Clause of the Fourteenth Amendment.

This Court has repeatedly applied the principle that if a "classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of equal protection of the law." (*Brown-Forman Co.* v. *Commonwealth of Kentucky,* 217 U.S. 563, 573 [1910]; *State Board of Tax Commissioners of Indiana* v. *Jackson,* 283 U.S. 527, 537 [1931].)

Within this guiding principle, the Court has held with respect to taxation:

> "The State may tax real and personal property in a different manner. It may grant exemptions * * *. It may impose different specific taxes upon different trades and professions and may vary the rates of excise upon various products. In levying such taxes, the State is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value." (*Ohio Oil Co.* v. *Conway,* 281 U.S. 146, 159 [1930].)

The Court has rejected claims of non-residents in a number of the cases discussed above (see Point I) that diversity of tax treatment between non-residents and residents

infringes their right to Equal Protection of the Laws. Thus, the language of the Court in *Maxwell* v. *Bugbee* is applicable to the case at bar:

> "Equal protection of the laws requires equal operation of the laws upon all persons in like circumstances. Under the statute, in the present case, the graduated taxes are levied equally upon all interests passing from non-resident testators or intestates. * * *
>
> "In order to invalidate this tax it must be held that the difference in the manner of assessing transmission of property by testators or intestates, as between resident and non-resident decedents, is so wholly arbitrary and unreasonable as to be beyond the legitimate authority of the State. We are not prepared so to declare. The resident testator or intestate stands in a different relation to the State than does the non-resident. The resident's property is usually within the ready control of the State * * *. As to the resident, his entire intangible, and usually most of his tangible property, pay tribute to the State when transferred by will or intestacy [whereas the taxable estate of the non-resident is more restricted]". (250 U.S. at pp. 541-542.)

In applying these principles of Equal Protection to the instant case, at the outset we press the point that the Vermont State income tax does not discriminate against non-residents. It gives them more advantageous treatment than residents, and is more generous in its allowance of exemptions and deductions than is constitutionally mandated (see Point II, *supra*). But regardless as to how the diversity of residents and non-residents be viewed in this case, there is no denial of Equal Protection. Surely, there is nothing "capricious" or "arbitrary" in seeking to apply the principle of taxation according to ability to pay to non-resi-

dents, along with residents. This policy fully satisfies the long standing Equal Protection test that "a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it." (*New York Rapid Transit Corp.* v. *City of New York,* 303 U.S. 573, 578 [1938].)

Nor can the Appellant prevail in his contention that the method of taxing non-residents employed by some other States, under which his tax rate would be determined by reference only to his Vermont source income, with a pro-rating of deductions and exemptions, should be used in this State. It is the prerogative and responsibility of the Vermont General Assembly to determine how non-residents should be taxed.

> "The States have a very wide discretion in the laying of their taxes * * * [The Equal Protection Clause] imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation." *Allied Stores of Ohio, Inc.* v. *Bowers,* 358 U.S. 522, 526 [1959].

We submit that the determination and design by the Vermont General Assembly of a levy structured so as to apply progressive income taxation to non-residents, as well as to residents—a principle upheld by this Court and woven into the fabric of the tax systems of most of the developed countries of the world—are not repugnant to the Equal Protection Clause.

Prayer for Relief

We respectfully submit, therefore, that the appeal does not present a substantial Federal question and that the questions are so insubstantial as not to warrant further argument. Accordingly, we respectfully request the Court to dismiss this appeal or to affirm the judgment of the Supreme Court of Vermont.

Respectfully submitted,

STATE OF VERMONT

by MESSRS. PATERSON, GIBSON, NOBLE AND BROWNELL

Jonathan N. Brownell, Esq.
Counsel for the Appellee

JEROME R. HELLERSTEIN
Of Counsel

Date: July 3, 1969

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 199

Docket No. 1927 (Vermont)

WILFRED R. WHEELER,

Appellant,

—v.—

STATE OF VERMONT.

ON APPEAL FROM THE SUPREME COURT OF VERMONT

Docket No. 42-69 (Vermont)

WILFRED R. WHEELER,

Appellant,

—v.—

STATE OF VERMONT.

ON APPEAL FROM THE SUPREME COURT OF VERMONT

PETITION FOR REHEARING

WILFRED WHEELER

by JAMES C. CLEVELAND
New London, New Hampshire

LAURENCE F. GARDNER
Lebanon, New Hampshire

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 139

Docket No. 1927 (Vermont)

WILFRED R. WHEELER,

Appellant,

—v.—

STATE OF VERMONT.

ON APPEAL FROM THE SUPREME COURT OF VERMONT

Docket No. 42-69 (Vermont)

WILFRED R. WHEELER,

Appellant,

—v.—

STATE OF VERMONT.

ON APPEAL FROM THE SUPREME COURT OF VERMONT

PETITION FOR REHEARING

The Appellant respectfully petitions for reconsideration of this Court's per curiam decision decided October 13, 1969 dismissing the appeal in this case for want of a substantial federal question. In support of this petition Appellant submits:

1. Appellant does not contend that Vermont cannot tax non-residents on income earned in Vermont, which has long been a well established constitutional principle. It is our contention that Vermont cannot use a non-resident's out-of-state income which admittedly it cannot tax, to increase the tax on his in-state income, thus, by indirection, taxing the out-of-state income.

2. Involved in this case is far more than Wilfred Wheeler and the few tax dollars we claim have been unconstitutionally taken from him. Thousands of New Hampshire people are already directly involved. Indirectly, millions of people who live in one state and work in another are also involved. If this case stands, it will expand with heightened impact, the taxing power of a state across state boundaries, inviting interstate tax invasions of substantial proportion.

3. There is no case decided by this Court squarely on the issues presented. No other states have adopted the Vermont system. The fact that tax hungry states, such as New York, have not attempted to use the Vermont system for taxing out-of-state workers, is clear proof of the lack of authority to embark on the novel Vermont system. It is exactly this point that makes the issues presented here a substantial federal question. Directly at stake is the substantial question whether states can use the Vermont method of taxing non-resident workers to expand their tax revenues by millions of dollars.

4. The State of Vermont itself desired a final decision on the troublesome and entirely novel issues pre-

sented by this case. This is proved by the record which shows how fully the State cooperated in presenting the two cases involved, and particularly to avoid any possibility that the first case might have been considered moot by this Court. At the very least, this Court should affirm the Vermont decision as they requested.

5. Otherwise, the Appellant or some other person will, eventually in full fairness to their claim and the thousands of other people involved, be constrained to try again by another route to have the important issue of this case decided by some tribunal other than one that is constituted by the same taxing authority whose method of taxing is being challenged.

In fairness to the states who must look to decision of this Court for guidelines to legally implement their revenue raising policies, a full decision on the substantial federal question presented here is manifestly in the best interests of our federal system. To leave this novel tax issue still shrouded in doubt would be a disservice to that system.

6. As a practical matter, the issue involved in these cases for most taxpayers in New Hampshire now, or other states later, will always involve a very small amount of money, rendering difficult the kind of challenge which has been put together in these test cases at considerable expense and investment of time. Such a situation could very well involve an instance where there is a right but, in effect, no remedy.

WHEREFORE, we respectfully suggest that there is a substantial federal question involved and request that the Court reconsider its per curiam decision decided on October 13, 1969.

by JAMES C. CLEVELAND
New London, New Hampshire

LAURENCE F. GARDNER
Lebanon, New Hampshire

I, James C. Cleveland, counsel for the Appellant, do hereby certify that the within Petition for Rehearing is presented to the Court in good faith and not for delay.

JAMES C. CLEVELAND
Attorney for the Appellant

SUPREME COURT OF THE UNITED STATES

October Term, 1969.

WHEELER *v.* VERMONT.

APPEAL FROM THE SUPREME COURT OF VERMONT.

No. 199. Decided October 13, 1969.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.